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No. 85-1320

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CENTRAL HARDWARE COMPANY,
Petitioner,

vs.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and LORAN W. ROBBINS, MARION M. WINSTEAD, HAROLD J. YATES, EARL L. JENNINGS, JR., HOWARD MCDOUGALL, ROBERT J. BAKER, ARTHUR H. BUNTE, JR., and R. V. PULLIAM SR., as trustees of the Central States, Southeast and Southwest Areas Pension Fund, and GEORGE W. LEHR, Executive Director of the Central States, Southeast and Southwest Areas Pension Fund,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE COURT OF APPEALS CORRECTLY HELD THAT THE GOVERNING TRUST INSTRUMENTS AUTHORIZE THE TRUSTEES TO REJECT PAYMENTS FROM PARTICIPATING EMPLOYERS WHICH THREATEN THE ACTUARIAL SOUNDNESS OF THE PENSION FUND.

2. WHETHER THE COURT OF APPEALS CORRECTLY HELD THAT CENTRAL HARDWARE FAILED TO SUSTAIN ITS BURDEN OF PROOF ON ITS CLAIMS OF ATTEMPTED MONOPOLIZATION AND/OR MONOPOLIZATION.

3. WHETHER THE COURT OF APPEALS CORRECTLY HELD THAT CENTRAL HARDWARE FAILED TO SUSTAIN ITS BURDEN OF PROOF ON ITS TYING CLAIM.

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CITATIONS TO OPINIONS BELOW

The November 8, 1985 Order of the United States Court of Appeals for the Eighth Circuit En Banc denying Central Hardware Company's Petition for Rehearing is reported at 770 F.2d 106 (8th Cir. 1985). The August 8, 1985 opinion of the United States Court of Appeals for the Eighth Circuit reversing the district court's ruling in favor of Central Hardware Company on its breach of the trust agreement claim and affirming the

district court's rejection of Central Hardware Company's tortious interference and antitrust claims is reported at 770 F.2d 106 (8th Cir. 1985). The August 14, 1984 opinion of Judge Roy W. Harper of the United States District Court for the Eastern District of Missouri, Eastern Division is reported at 595 F. Supp. 414 (E.D. Mo. 1984).

STATEMENT

1. The Parties

Central States Southeast and Southwest Areas Pension Fund ("Central States" or "the Fund") is a defined benefit Taft-Hartley pension fund established for the purpose of managing, investing and disbursing pension benefit contributions made by employers for the benefit of their employees pursuant to collective bargaining agreements with Teamsters union locals. (Joint Stip. Facts, ¶ 2, App. at 24). The Board of Trustees of the Fund ("Trustees") is composed of four management and four union trustees. The Fund is subject to the provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et. seq., (Joint Stip. Facts, ¶ 4, App. at 25).

Central Hardware Company ("Central Hardware"), a Missouri corporation, is by virtue of its participation in the Trust Agreement of The Fund and its collective bargaining agreement with St. Louis Teamsters Local Union No. 688 (Local 688), a participating employer in The Fund. (Joint Stipulation, ¶¶ 5, 13-14, App. at 25-26). After 1980, the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act (MPPAA), 29 U.S.C. § 1301 et seq. (1980), an amendment to ERISA, applied to Central Hardware, a fact of signal importance in understanding its actions in negotiating a 1982 collective bargaining agreement with Teamsters Local 688 which is the core of this dispute. (Joint Stipulation, ¶¶ 21-23, App. at 27-28; Tr. 14-15; 43).

2. Facts

In 1982, Central Hardware and Local 688 negotiated a collective bargaining agreement which differed radically in one respect from their prior agreements dating back to 1959. (Joint Stipulation, ¶¶ 15, 17, 24, App. at 26-28; Tr. 149). The pension benefit provisions of this agreement provided that Central Hardware would no longer make pension benefit payments to Central States for employees hired after May 19, 1982. (Ex. 13, App. at 98). Pension benefit payments for these new employees would be made instead to the Teamsters Negotiated Pension Plan which was administered by the Occidental Insurance Co. (*Id.*) The agreement provided for continuing benefit payments to Central States for older employees who were on the rolls as of May 19, 1982. (*Id.* at 97-98).

From Central States' viewpoint, the agreement would adversely affect the Fund and its financing in that the Fund would be cut off from its source of new members whose benefit payments would be used in part to fund the retirement benefits of the older members of the Central Hardware bargaining unit as those payments became due. (Ex. 26, App. at 154; Tr. 122-125). The result of being cut-off from new membership in this manner would inevitably result either in a reduction of the benefits due retiring employees in an amount commensurate with the loss of future benefit payments or in a corresponding increase in the benefit payments due from other contributing employers. (Ex. 26, App. at 155).

Upon receipt of the 1982 Central Hardware contract in October, 1982, nearly five months after its execution, the staff of the Fund reviewed and then submitted it to the Trustees for a determination as to its acceptability. The full Board of Trustees reviewed the contract at the Board's October 18-19, 1982 meeting and resolved to reject the contract. (Ex. 24, App. at 151). The Operations Director of the Fund informed Central Hardware and Local 688 on October 25, 1982 that the Trustees

had determined that the pension contribution provisions of the contract were unacceptable.[1] (Ex. 23, App. at 150).

3. Decisions Below

On August 8, 1985, a panel of the Eighth Circuit reversed the District Court's decision requiring the Trustees to accept the pension contribution provisions of Central Hardware's collective bargaining agreement despite the Trustees policy against accepting pension contribution provisions which detrimentally impact on the participants and beneficiaries of the Fund. The panel held that the Trustees were authorized under the governing trust documents (the Trust Agreement, the Pension Plan and the Participation Agreement) and Central Hardware's own 1982-1985 Collective Bargaining Agreement to refuse to accept contributions tendered to the Fund under circumstances that threaten the actuarial soundness of the Fund.[2] 770 F.2d at 110.

On November 8, 1985, the United States Court of Appeals for the Eighth Circuit denied Central Hardware Company's Petition for Rehearing En Banc. 770 F.2d at 106. Central Hardware's Petition consisted of the same allegations which it made

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[1] The Fund's consulting actuary reviewed the 1982 contract and confirmed that it indeed constituted "a clear-cut attempt at antiselection" which threatened to result in an $880,000 loss to the Fund. (Ex. 26, App. at 155-156, Tr. 128). The actuary concluded his report to The Fund with these remarks,

> The policy prohibiting acceptance of this type of agreement protects the fund against agreements that could be detrimental to the actuarial soundness of the Fund. The decision to terminate their participation rather than accept such an agreement can be considered fully justifiable from an actuarial viewpoint.

(Ex. 26, App. at 156).

[2] The panel also held, as did the District Court, that the actions of the Trustees did not constitute a violation of §§ 1 or 2 of the Sherman Antitrust Act.

before the panel of the Eighth Circuit and which it now makes before this Honorable Court.

Central Hardware argues before this Court, as it argued in its Petition for Rehearing En Banc, that the decision of the panel of the United States Court of Appeals for the Eighth Circuit raises issues of grave constitutional dimensions and exceptional public importance regarding the integrity of the collective bargaining process, the interpretation of the Multiemployer Pension Plan Amendment Act of 1980 ("MPPAA"), 29 U.S.C. § 1322a, et seq., and directly conflicts with prior Supreme Court and Eighth Circuit precedent. For the reasons set forth below, however, Central States urges this Court to hold that further review of the decisions of the Eighth Circuit is unwarranted because there is no colorable inconsistency between the decisions of the Eighth Circuit and prior Supreme Court precedent.

SUMMARY OF ARGUMENT

Central States urges this Court to deny Central Hardware's Petition for Certiorari because:

1. The Eighth Circuit's determination of the authority of the Fund's Trustees under the Trust Agreement and associated trust documents is consistent with the decision of this Court in *N.L.R.B. v. Amax Coal Co.* and, therefore, Central Hardware has presented no issue on this point which warrants granting Certiorari;

2. The Eighth Circuit made no holding on the hypothetical MPPAA issue raised in the Petition for Certiorari, therefore, review is unwarranted; and

3. The Eighth Circuit's decision regarding the antitrust issues raised by Petitioner is consistent with prior decisions of the Supreme Court.

ARGUMENT

I.

The Eighth Circuit's Determination That The Governing Trust Instruments Authorize The Trustees To Reject Payments From Participating Employers Which Threaten The Fund's Actuarial Soundness Is Consistent With The Decision Of This Court In *N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322 (1981).

Petitioner contends that the decision below undermines the integrity of multiemployer plans by giving authority to Pension Fund trustees to reject contributions made pursuant to collective bargaining agreements. Petition for Certiorari ("Petition") at 15. Petitioner contends that such result is in conflict with this Court decision in *N.L.R.B. v. Coal,* 453 U.S. 322 (1981).

In *Amax Coal,* however, this Court emphasized the Pension Fund Trustees are obligated to remain insulated from the bargaining process and any interests other than those of the Plan's participants and beneficiaries. Petitioner would have this Court read *Amax Coal* to prohibit a Fund from adopting any rules, irrespective of their purpose or actuarial soundness, that result in the nonacceptance of participation under collective bargaining agreements. But *Amax Coal* supports no such conclusion.

The decision below is fully consistent with *Amax Coal.* The Court of Appeals concluded that the Fund rule in fact served the interests of participants and beneficiaries, as *Amax Coal* requires. The Eighth Circuit's decision was not a broad grant of authority to disregard collective bargaining agreements but was limited to upholding a rule that existed to promote the financial soundness of the plan. The Court emphasized:

> [O]ur holding is in no way meant to imply that [Central States] has the authority to alter, reject, or rewrite the terms of the collective bargaining agreement between [Central Hardware] and the Union.

770 F.2d at 111. That quote puts the Eighth Circuit decision in its proper context. Rather than allow an alteration, rejection or rewriting of the terms of the collective bargaining agreement, the panel's decision upholds the express provisions of the collective bargaining agreement and of the trust documents.

Specifically, the panel held:

> [S]ection 32.04 of the collective bargaining agreement and paragraph 7 of the participation agreement bind [Central Hardware] and the Union to all rules and regulations adopted by the trustees and all actions taken by the trustees in the administration of the trust.[3]

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[3] "The participation agreement referred to is Central Hardware's Employer Participation Agreement in which it agreed to participate in the Fund. It provides in pertinent part:

> The Union and the Employer agree to be bound by, and hereby assent to all of the terms of the Trust Agreement creating said Central States, Southeast and Southwest Areas Pension Fund, all of the rules and regulations heretofore and hereafter adopted by the Trustees of said Trust Fund pursuant to said Trust Agreement, and all of the actions of the Trustees in administering such Trust Fund in accordance with the Trust Agreement and rules adopted.

Ex. 6, App. at 84.

The collective bargaining agreement referred to is the 1982-85 Agreement between Central Hardware and Teamsters Local 688. It provides in pertinent part:

> The Union and the Employer agree to be bound by, and hereby assent to all of the terms of the Trust Agreement creating said Central States, Southeast and Southwest Areas Pension Fund, all of the rules and regulations heretofore and hereafter adopted by the Trustees of said Trust Fund pursuant to said Trust Agreement, and all of the actions of the Trustees in administering such Trust Fund in accordance with the Trust Agreement and rules adopted. Their signatures to this collective bargaining agreement shall be deemed sufficient to signify their assent to and willingness to be bound by the terms of said Trust Agreement as fully as though they and each of them had indicated their assent of and executed said Trust Agreement.

Ex. 13, § 32.04; App. at 98.

770 F.2d at 110. Thus, the agreements to which Central Hardware subscribed recognized the Trustees' right to regulate collective bargaining agreement provisions by rule and regulation and those agreements wholly support the Eighth Circuit's finding that "[Central Hardware] has agreed to be bound by all decisions of the trustees." *Id.*

Moreover, Central Hardware's collective bargaining agreement recognized that it was contingent upon judicial review.

> [T]he memorandum provided that in the event of a judicial determination that the new agreement violates the terms of Central States' plan, Central Hardware agrees that contributions for the newly hired employees will be made to Central States rather than to the TNOPP.[4]

770 F.2d at 108.

Given all the aforementioned, it would have been anomalous for the Eighth Circuit to conclude that the Fund is required to accept any and all provisions of a collective bargaining agreement without regard to the Fund's rules and regulations. Moreover, in its Petition for Certiorari, Central Hardware acknowledges that Congress expressly recognized that the primacy of the collective bargaining process is tempered to the extent consistent with assuring the financial soundness of multiemployer plans to meet benefit commitments. Petition at

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[4] The memorandum referred to is the "mid-term" Memorandum of Understanding between Central Hardware and Local 688 executed on July 10, 1980, prior to the enactment of the withdrawal liability provisions of the MPPAA. The memorandum provided for continuing discussions regarding pension payments for all or some of Central Hardware's bargaining unit to the Teamsters Negotiated Occidental Pension Plan (TNOPP) rather than to Central States. As a consequence of the enactment of MPPAA, however, Central Hardware abandoned its demands for removal of the entire bargaining unit from the Fund and opted for the partial withdrawal scheme embodied in the 1982-1985 agreement which through attrition would lead to complete withdrawal. (Ex. 13, App. at 97-98; Tr. 13).

15, *citing,* House Report 96-869, 96th Congress 2d Sess. 1980, *reprinted in,* [4] 1980 U.S. Cong. and Admin. News, pp. 2918, 2931.

Inasmuch as Central Hardware agreed in its collective bargaining agreement to be bound by all rules adopted by the trustees, it is in no position to now assert that the adoption of rules with which it disagrees has had or will have the effect of compromising the "entire collective bargaining process" or even of altering the existing agreement. The record clearly supports the panel's finding that:

> As provided in the trust agreement, 'any construction [of the trust agreement] adopted by the Trustees in good faith shall be binding upon the Union, Employees and Employer.'

770 F.2d at 110.

Central Hardware's Petition for Certiorari on this point, therefore, is founded on a premise which is disproven by the various agreements and indentures to which Central Hardware has subscribed, as well as the decision of the Supreme Court in *N.L.R.B. v. Amax Coal Co., supra.* Moreover, the court's decisions on this issue are essentially fact-bound and afford no basis for review. Accordingly, the petition raises no grave issue as to the integrity of the collective bargaining process and should be denied.

II.

The Eighth Circuit Made No Holding Regarding The Applicability Of The Multiemployer Pension Plan Amendments Act In This Case, Therefore, The Hypothetical Issues Raised By Petitioner Should Not Be Reviewed.

Central Hardware argues that the Eighth Circuit decision abrogates certain provisions of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) in that it improperly allows

the trustees to trigger the withdrawal liability provisions of MPPAA. This, however, is not the case. Any withdrawal here would be triggered not by the trustees, but by the Union and Central Hardware attempting to enforce a collective bargaining provision which violates the rules of the Fund.

Moreover, despite Central Hardware's protestations to the contrary, the Eighth Circuit panel made no holding regarding the MPPAA in its decision. Rather than simply comply with the provision of the collective bargaining agreement providing that should a court uphold the trustee's position, as the Eighth Circuit has, Central Hardware would pay contributions for its entire unit and there would be no withdrawal at all, Central Hardware seeks to obtain this Court's review of hypothetical issues which were neither raised before nor considered by the panel.

Thus, certiorari is not warranted on this point because the panel made no holdings, nor were any holdings necessary, on the right of the trustees to precipitate a withdrawal liability.

III.

The Eighth Circuit's Determination That Central Hardware Failed To Prove A Claim Under Section 2 Of The Sherman Antitrust Act Is Consistent With The Decisions Of This Court Which Require A Plaintiff To Prove Specific Intent, The Relevant Product Market, The Relevant Geographic Market Power In Order To Succeed On A Claim Of Attempted Monopolization And Monopolization.

Central Hardware argues that the District Court erred in relying on a "good faith" test, rather than an "anticompetitive effect" test, in analyzing the actions of the Trustees under the antitrust laws. Assuming *arguendo* that the District Court did rely on a "good faith" test, under the decisions of the Supreme Court, Central Hardware's failure to establish any element

necessary to sustain a claim of attempted monopolization or monopolization under Section 2 of the Sherman Act justified the District Court's holding that Central Hardware failed to sustain its burden of proof on its attempt to monopolize and monopolization claims. *American Tobacco Co. v. United States,* 328 U.S. 781 (1946); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477 (1977).

A review of the record in this case establishes that Central Hardware failed to prove specific intent to monopolize or obtain monopoly power, failed to prove the relevant product market, failed to prove the relevant geographic market and failed to prove market power. Absent a showing of all these requisite elements, the Eighth Circuit correctly applied long-established rule of law and had no recourse except to affirm the District Court's finding that Central Hardware had failed to prove a claim of attempted monopolization or monopolization.

IV.

The Eighth Circuit's Determination Rejecting The Tying Claim By Central Hardware Is Consistent With The Decision Of This Court In *Jefferon Parish Hospital District No. 2 v. Hyde,* 104 S. Ct. 1551 (1984).

In order to establish an unlawful tying arrangement in violation of § 1 of the Sherman Act, under the decisions of the Supreme Court the plaintiff must come forward with evidence of two distinct products or services, sufficient economic power and the amount of interstate commerce affected by the tying arrangement. *Jeferson Parish Hospital District No. 2 v. Hyde,* 104 S. Ct. 1551 (1984). In this case, Central Hardware failed to prove the presence of two product markets, failed to prove economic power in the tying market, and failed to prove the amount of commerce affected by the tying arrangement.

This failure of proof warranted the Eighth Circuit's affirmance of the finding of the District Court that Central Hardware had failed to sustain its burden of proof in establishing its claim of unlawful tying.

CONCLUSION

Central States urges this Court to deny Central Hardware's Petition for Certiorari for the reason that the Eighth Circuit's decision of August 8, 1985 is wholly supported by and not in any way inconsistent with prior Supreme Court precedent and Central Hardware has not raised issues of grave constitutional dimensions or exceptional public importance.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing was mailed, first class postage prepaid, this 17th day of March, 1986 to Keith E. Mattern and Lynn Chipperfield, 10 Broadway, 14th Floor, St. Louis, Missouri 63102, Counsel for Petitioner.

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